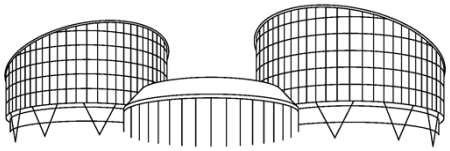

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PASTÖRS v. GERMANY

(Application no. 55225/14)

JUDGMENT

STRASBOURG

3 October 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pastörs v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Yonko Grozev, *President,*
Angelika Nußberger,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lado Chanturia, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 9 July 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 55225/14) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Udo Pastörs ("the applicant"), on 30 July 2014.

2. The applicant, who was born in 1952 and lives in Lübtheen, was represented by Mr P. Richter, a lawyer practising in Saarbrücken. The German Government ("the Government") were represented by one their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged that his criminal conviction for statements that he had made on 28 January 2010 had breached his right to freedom of expression, as guaranteed by Article 10 of the Convention. Relying on Article 6 § 1 of the Convention, he furthermore complained that the Court of Appeal had lacked impartiality in the light of the involvement of judge X.

4. On 1 September 2016 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

5. The applicant was a Member of Parliament and chairperson of the National Democratic Party of Germany (NPD) in the *Land* Parliament of Mecklenburg-Western Pomerania. On 27 January 2010, Holocaust Remembrance Day, a memorial event was held in the *Land* Parliament. The members of the NPD Parliamentary group, including the applicant, did not attend. The following day, the applicant gave a speech in Parliament on the subject listed in the day's agenda as: "In memory of the victims of the worst disaster in German maritime history – Commemoration of those who died on the [military transport ship] *Wilhelm Gustloff*". During that speech, the applicant uttered, *inter alia*, the following:

> "With the exception of the groups whose cooperation you have bought, hardly anyone is truly, emotionally taking part in your theatrical display of concern. And why is that? Because people can sense that the so-called Holocaust is being used for political and commercial purposes ... Since the end of the Second World War, Germans have been exposed to an endless barrage of criticism and propagandistic lies – cultivated in a dishonest manner primarily by representatives of the so-called democratic parties, ladies and gentlemen. Also, the event that you organised here in the castle yesterday was nothing more than you imposing your Auschwitz projections onto the German people in a manner that is both cunning and brutal. You are hoping, ladies and gentlemen, for the triumph of lies over truth."
>
> ("*... Bis auf die von Ihnen gekauften Grüppchen und Gruppierungen nimmt kaum noch jemand wirklich innerlich bewegt Anteil an dem Betroffenheitstheater. Und warum ist das so? Weil die Menschen spüren, dass der sogenannte Holocaust politischen und kommerziellen Zwecken dienbar gemacht wird ... Die Deutschen sind seit Ende des Zweiten Weltkrieges einem ununterbrochenen Trommelfeuer von Vorwürfen und Propagandalügen ausgesetzt, deren Bewirtschaftung in verlogener Art und Weise in erster Linie von Vertretern der sogenannten demokratischen Parteien bewirtschaftet wird, meine Herrschaften. Auch was Sie gestern hier im Schloss wieder veranstaltet haben, war nichts anderes, als dem deutschen Volk ebenso raffiniert wie brutal ihre Auschwitzprojektionen überzustülpen. Sie, meine Damen und Herren, hoffen auf den Sieg der Lüge über die Wahrheit. ...*")

6. The Parliament of the *Land* of Mecklenburg-Western Pomerania revoked the applicant's inviolability from prosecution (see paragraph 29 below) on 1 February 2012.

B. The proceedings at issue

7. On 16 August 2012 the Schwerin District Court, sitting as a bench of the presiding professional judge Y and two lay judges, convicted the

applicant of violating the memory of the dead and of defamation (see paragraph 28 below) through the utterances cited above; the court sentenced him to eight months' imprisonment, suspended on probation.

8. The applicant appealed on points of fact and law. In respect of that appeal the Schwerin Regional Court held a main hearing on 25 March 2013, which included the taking of evidence. The applicant did not comment on the charges against him. In its judgment of the same day, the court dismissed the applicant's appeal as ill-founded.

9. In its judgment, the Regional Court cited the applicant's speech in its entirety, highlighting the excerpts quoted above, which it considered relevant to an assessment of the applicant's criminal liability. It considered that the applicant's above-cited utterance, viewed objectively, had had the following content:

> "The applicant asserted that the extermination of the Jews linked to Auschwitz had not taken place, or at least not in the way that it had been reported by historians. The atrocities associated with Auschwitz were a lie and a projection. The lies surrounding Auschwitz had been used since the end of the Second World War to serve various political and economic purposes."

The Regional Court concluded that the applicant had thereby denied in a qualified manner the systematic, racially motivated, mass extermination of the Jews carried out at Auschwitz during the Third Reich (*qualifizierte Auschwitzleugnung*).

10. In arriving at this conclusion, the Regional Court considered that the applicant had first spoken of a "barrage of propagandistic lies", to which the Germans had been endlessly exposed since the end of the Second World War, and mentioned the "Auschwitz projection" (*Auschwitzprojektion*) as an example thereof. Linguistically, he had used the terms "lie" and "projection" in close succession as having the same intended meaning, as could be seen in the structure of the sentence. He had used the term "Auschwitz projection" in a sequence that had also contained the terms "propagandistic lies", "dishonest" and "lie", connected by the word "also". With regard to perpetrators and motives in respect of "the Auschwitz lie", he stated that the propagandistic lies had been "cultivated in a dishonest manner primarily by representatives of the so-called democratic parties" and that "the so-called Holocaust [was] being used for political and commercial purposes".

11. The Regional Court noted that terms such as "Auschwitz lie", "Auschwitz myth" and "Auschwitz cudgel" – which were used time and again in connection with the claim that the murder of millions of Jews during the Third Reich was a (Zionist) swindle – epitomised the assertion that the Holocaust and the events that had taken place in Auschwitz had not occurred as documented in official history books. The term "Auschwitz projection" served that same purpose. The applicant's reasoning for the alleged "Auschwitz projection" – namely the "[use of the] Holocaust for

political and commercial purposes" – invoked an idea that had occupied German courts in numerous cases: namely, the association of "Auschwitz denial" with a particular motive – that is to say the alleged suppression and exploitation of Germany (for the benefit of the Jews), which German courts had determined to constitute a "qualified Auschwitz denial". The Regional Court ruled out the possibility that the applicant's statements – which, objectively, were to be understood as constituting a "qualified Auschwitz denial" – could have been misunderstood.

12. The Regional Court observed that the applicant had not commented on the speech during the appeal hearing and that his lawyer had put forward unconvincing interpretations. It was not in dispute that large parts of the applicant's speech did not raise an issue under criminal law, either because they did not constitute criminal offences or because of the applicant's non-liability (*Indemnität*, see paragraph 29 below). However, these parts of the applicant's speech could not mitigate or whitewash (*schön reden*) the utterance cited above. It considered that the applicant had chosen the *Wilhelm Gustloff* as a subject by way of creating a contrast to the memorial event of 27 January 2010. In large parts of his speech he had referred to German victims of the Second World War – in particular those who had been on the *Wilhelm Gustloff* – and to other mass murders that had occurred in history. This did not raise an issue under criminal law. In so far as he had criticised the remembrance of the victims of National Socialism and had used dramatic, striking terminology (such as "guilt cult", "guilt-cult events" and "theatrical display of concern") to that end, he could rely on his right to freedom of expression as a Member of Parliament, which included the right to make absurd statements in a speech to Parliament.

13. However, those statements could not mitigate or conceal the qualified Auschwitz denial. The latter had constituted only a small part of the applicant's speech and the applicant had inserted that denial into the speech as if "inserting poison into a glass of water, hoping that it would not be detected immediately". For that reason, the Speaker of Parliament had not issued a sanction during the applicant's speech, and the MPs present had only expressed their indignation. The Regional Court was convinced that the applicant had intended to convey his message exactly in the way that it had been perceived. He wanted to question the accepted truth about Auschwitz and to "sneak" this into Parliament (*dem Parlament "unterjubeln")* in such a way that no parliamentary measures would be taken.

14. The Regional Court found that the applicant's qualified Auschwitz denial constituted defamation under Article 187 of the Criminal Code (see paragraph 28 below). The victims of the offence were those Jewish people who – as part of the German population – had been persecuted during the Nazi tyranny because of their religion or their ethnic origin and who had either lost their lives as a result or survived such persecution. The

systematic mass murder of the Jews, committed in the concentration camps during the Second World War, was an established historical fact. The qualified Auschwitz denial given by the applicant was tantamount to an untruth. The applicant's assertions were capable of defaming the persecution of the Jews in Germany (*das Verfolgungsschicksal der betroffenen Juden in Deutschland verächtlich zu machen*) – an event which formed an inherent part of their personal dignity. The speech had been given in Parliament and had been broadcast over the Internet at the same time. The applicant had acted with intent. He could not rely on his right to freedom of expression in respect of his denial of the Holocaust. In making his defamatory statements, the applicant had also denigrated the memory of those murdered in Auschwitz during the Nazi dictatorship because of their Jewish origins. He was thus also guilty of violating those peoples' memory under Article 189 of the Criminal Code (see paragraph 28 below).

15. The applicant could not invoke his inviolability from prosecution as a Member of Parliament, because the Parliament of Mecklenburg-Western Pomerania had revoked it (see paragraph 6 above and paragraph 29 below). Nor was the applicant's criminal liability barred by his non-liability under Article 24 § 1 of the Constitution of the *Land* of Mecklenburg-Western Pomerania and Article 36 of the Criminal Code (see paragraph 29 below), because defamation (*verleumderische Beleidigungen*) – under both Article 187 and Article 189 of the Criminal Code – did not fall within the scope of that non-liability. In so far as the applicant may have erred in his understanding of the scope of his non-liability, this did not affect his criminal liability.

16. On 25 March 2013 the applicant lodged an appeal on points of law against the above-mentioned judgment with the Rostock Court of Appeal.

17. After learning that one of the three judges of the Rostock Court of Appeal responsible for adjudicating that appeal, X, was the husband of the professional District Court judge Y, who had convicted the applicant at first instance (see paragraph 7 above), the applicant, by means of a written submission dated 5 August 2013, lodged a complaint of bias in respect of judge X.

18. On 6 August 2013 judge X commented in writing on his alleged bias, stating that his wife had – in view of the extensive media coverage of the case – informed him about the course of the proceedings before the District Court. Apart from that, the proceedings had – in line with their general practice – not formed part of their conversations. He was not biased in the proceedings at issue. He also emphasised that the Court of Appeal was called upon to examine the Regional Court's judgment, not that of the District Court.

19. On 16 August 2013 the Court of Appeal, with the participation of the challenged judge X, dismissed the bias complaint as inadmissible under Article 26a of the Code of Criminal Procedure (see paragraph 31 below). It

explained that it had only examined the appellate judgment delivered by the Regional Court, not the first-instance judgment delivered by the District Court. Following the applicant's appeal on points of fact and law, the Regional Court had not been called on to review the District Court's judgment, but rather had had to conduct a main hearing and to comprehensively establish the circumstances of the case anew – both in fact and in law. The fact that X and Y were married could not in itself lead to a fear of bias. The complaint was thus completely ill-suited (*völlig ungeeignet*).

20. By the same decision, the Court of Appeal dismissed the applicant's appeal on points of law as ill-founded, finding no legal error to his detriment in the Regional Court's judgment.

21. On 22 August 2013 the applicant lodged a motion to be heard, alleging that the Court of Appeal had not addressed some of his arguments relating to his criminal conviction and some relating to his bias complaint against judge X, notably that X, if the appeal on points of law were granted, would have to criticise his wife indirectly, which he would be reluctant to do; that the spouses had talked about the subject matter of the proceedings and that, in the absence of a statement by X specifying the content of the discussions, it had to be assumed that they talked about the key legal issues of the case and that X was hence not impartial. The bias complaint against X had, at least, to be deemed admissible and be adjudicated without X's participation, even more so as X was the rapporteur. He requested that the decision of 16 August 2013 be quashed and the proceedings concerning the appeal on points of law be continued.

22. By the same submission, he lodged a bias complaint against the three judges who took the decision of 16 August 2013. There were serious doubts as to their impartiality, as they had not even remotely addressed the applicant's submission in his appeal on points of law and did not seem to have the slightest problem with the fact that X had indirectly reviewed his wife's judgment. They even assigned X as the rapporteur in the case and dismissed the applicant's bias complaint against X as inadmissible. This showed that their approach to the subject matter of the proceedings was ill-considered and dominated by inappropriate (*sachfremd*) considerations concerning the applicant. The procedural approach employed was arbitrary, notably because the conditions of Article 26a of the Code of Criminal Procedure were not met. It was evident that the bias complaint did not call for a purely formal decision, but would have required an in-depth assessment. The arbitrary processing of the bias complaint gave raise to doubts as to the impartiality of the judges who took that decision.

23. On 11 November 2013 the Court of Appeal dismissed the bias complaint against all three judges who took the decision of 16 August 2013. Sitting as a bench of three judges, none of whom had been involved in the decision of 16 August 2013, it noted that bias complaints that were lodged

after a decision to dismiss an appeal on points of law as ill-founded were, in principle, belated and thus inadmissible under Article 26a of the Code of Criminal Procedure. For a bias complaint to be admissible, it had to be lodged prior to the decision dismissing the appeal on points of law as ill-founded. This would equally be true where the bias complaint was made in conjunction with an ill-founded motion to be heard. The purpose of Article 356a of the Code of Criminal Procedure, which concerned breaches of the right to be heard in a decision on an appeal on points of law, was to provide the Court of Appeal with the opportunity to remedy a breach of a right to be heard by way of another assessment of the merits of the appeal on points of law. Its purpose was not, however, to enforce (*Geltung verschaffen*) a belated, and thus inadmissible, bias complaint through an impertinent claim that the right to be heard had been breached. However, in the present case, the decision of 16 August 2013 not only concerned the dismissal of the appeal on points of law as ill-founded, but also a bias complaint. In view of these particularities, it was not appropriate to adjudicate the applicant's subsequent bias complaint in accordance with Article 26a of the Code of Criminal Procedure, as that provision was to be interpreted narrowly and was foreseen for exceptions, with its scope in principle limited to purely formal decisions. The applicant's subsequent bias complaint was thus admissible.

24. Turning to the merits, the court found that the applicant's second bias complaint against the three judges was, however, ill-founded. Doubts as to the impartiality of a judge were justified where the person alleging bias, based on a sensible assessment of the facts known to him, has reason to believe that the judge concerned would take a position which could interfere with his impartiality. The decisive standpoint was that of a reasonable defendant and the ideas that a party to the proceedings, who was mentally sound and in full possession of his reason (*ein geistig gesunder, bei voller Vernunft befindlicher Prozessbeteiligter*), may have when assessing the circumstances in a serene manner, which could reasonably be expected of him. As a rule, the participation of a judge in earlier decisions was not a ground for objecting to a judge (*Ablehnungsgrund*), because a reasonable defendant must assume that the judge did not, thereby, determine his position for future decisions. The situation was different where particularities of the prior involvement, such as grossly flawed or even arbitrary (wrong) decisions to the detriment of the person concerned, gave rise to a (well-founded) suspicion of partiality in an individual case.

25. In the present case, such grounds justifying the objection had neither been submitted by the applicant nor were they evident. The applicant had not substantiated objectively reasonable circumstances giving rise to a fear of bias. The prior involvement of a judge with the substance matter of the proceedings was, in itself, never a ground for objecting to a judge, as a reasonable defendant can assume that the judge will approach the matter

without bias, even if he had previously formed an opinion on the case. This also applied to a judge dealing with appeals on points of law. It was true that the applicant had additionally submitted that the very manner of the prior involvement proved the partiality of the challenged judges. However, specific circumstances which would justify such fear also from the perspective of a reasonable applicant were not apparent. The applicant's submission was, in substance, limited to complaining that the judges had not followed his line of reasoning and to alleging that the judges had thus "repeatedly and intentionally" breached his right to be heard and that they proceeded in an "objectively arbitrary" manner. This was not sufficient. A sensible assessment of the decisions to the applicant's detriment, which he considered flawed, did not justify a fear of bias in respect of the challenged judges.

26. On 14 November 2013 the Court of Appeal rejected the applicant's objection to its decision of 16 August 2013, in which he alleged a violation of his right to be heard, concerning his appeal on points of law.

27. On 5 June 2014 the Federal Constitutional Court declined to accept the applicant's constitutional complaint for adjudication, without providing reasons (no. 2 BvR 2636/13).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant criminal offences

28. The relevant provisions of the Criminal Code read as follows:

Article 187 [Intentional defamation]

"Whosoever intentionally and knowingly asserts or disseminates an untruth related to another person that may defame him or negatively affect public opinion about him or endanger his creditworthiness shall be liable to [a term of] imprisonment not exceeding two years or a fine and, if the offence was committed publicly, in a meeting or through the dissemination of written materials ..., to [a term of] imprisonment not exceeding five years or a fine."

Article 189 [Violating the memory of the dead]

"Whosoever defames the memory of a deceased person shall be liable to [a term of] imprisonment not exceeding two years or a fine."

B. Immunity (non-liability and inviolability) for statements made in Parliament

29. Non-liability (*Indemnität*) excludes criminal liability for a vote cast or a statement made in Parliament, including after the end of the term of office, and cannot be revoked (*Strafausschließungsgrund*). It does not apply

to cases of intentional defamation (Article 36 of the Criminal Code), which can thus be subject to criminal prosecution, if Parliament gives its permission – revoking the inviolability (*Immunität*) enjoyed by the MP concerned – or if the MP is apprehended while committing the offence or in course of the following day. Article 24 §§ 1 and 2 of the Constitution of the *Land* of Mecklenburg-Western Pomerania are applicable to Members of the Parliament of the *Land* and read as follows:

Article 24 of the Constitution of the *Land* of Mecklenburg-Western Pomerania [Non-liability, Inviolability, Right to Refuse Testimony]

"(1) At no time may a Member of the *Land* Parliament be subjected to court proceedings or disciplinary action or be otherwise called to account outside the *Land* Parliament for a vote cast or for any utterance made in the *Land* Parliament or in any of its committees. This provision shall not apply to defamatory insults.

(2) A Member of the *Land* Parliament may not be called to account or arrested for a punishable offence without the permission of the *Land* Parliament, unless he is apprehended while committing the offence or in the course of the following day. The permission of the *Land* Parliament shall also be required for [the imposition of] any deprivation or other restriction on the liberty of a Member of the *Land* Parliament or for the initiation of proceedings against that Member.

..."

C. Disqualification of judges and proceedings in respect of complaints of bias

30. Article 22 of the Code of Criminal Procedure lists a number of scenarios in which personal relationships disqualify, by law, a judge from sitting on a case. Marriage to another judge involved at a different level of jurisdiction in the same proceedings is not listed. However, a judge may still be disqualified under Article 24 of the Code if there are grounds justifying doubts as to the judge's impartiality. The case-law of the domestic courts diverges as to whether a justifiable fear of bias follows from the fact of marriage alone in a scenario in which the challenged judge is married to the judge who rendered judgment at the level of jurisdiction immediately below and in which that judgment is under scrutiny at the appeal stage (no fear of bias found by the Federal Court of Justice, no. II ZB 31/02, decision of 20 October 2003; fear of bias found by the Federal Social Court, no. B 14 AS 70/AS, decision of 18 March 2013, in view of the complexity of, and close scrutiny of the challenged judgment in, proceedings concerning an appeal on points of law).

31. As a rule, the court must rule on a complaint of bias without the challenged judge being involved in reaching that decision (Article 27 of the Code of Criminal Procedure). Article 26a of the Code provides an exception whereby under certain circumstances the adjudicating court may reach its decision with the participation of the challenged judge. The objective of that

exception is to avoid courts having to interrupt or even stay proceedings in order for certain challenges to be examined. The provision permits the participation of the challenged judge in the decision if, *inter alia*, the challenge does not disclose the grounds for the alleged bias (Article 26a § 1 number 2). According to the case-law of the domestic courts, this latter provision also covers cases where the grounds for the challenge is disclosed but is completely ill-suited (see Federal Constitutional Court, no. 2 BvR 1674/06, decision of 27 April 2007; Federal Court of Justice, no. 3 StR 239/12, decision of 15 November 2012). The provision is to be interpreted narrowly, and a challenge may only be considered "completely ill-suited" when it can be rejected without any examination of the subject matter of the proceedings; it does not suffice that the challenge is manifestly ill-founded (Federal Constitutional Court, no. 2 BvR 1674/06, cited above).

32. Where a complaint of bias is deemed to be well-founded, the respective judge is disqualified from sitting in further decisions on that case. Where a bias complaint, which has been lodged after a decision to dismiss an appeal on points of law, is lodged against the judges who took that decision, these judges are, if the complaint of bias is deemed to be well-founded, excluded from sitting in further decisions of that case which, in practice, notably concerns a motion to be heard (*Anhörungsrüge*) that has not yet been adjudicated. In respect of a motion to be heard, the scope of assessment is limited to the question of whether the applicant's right to be heard had been breached by the impugned decision; it does not entail a full assessment in fact and in law of the impugned decision itself. A fear of bias against one of the judges sitting on the impugned decision does not in itself render the motion to be heard well-founded. If a motion to be heard is deemed to be well-founded, the proceedings have to be reinstated to the situation as it was prior to the breach of the right to be heard, that is, prior to the impugned decision (Article 356a of the Code of Criminal Procedure). If the judges who took that decision are deemed to have been biased, they are disqualified from sitting in the new substantive decision.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicant complained that his criminal conviction for violating the memory of the dead and for defamation had breached his right to freedom of expression, as guaranteed by Article 10 of the Convention, which, insofar as relevant, reads as follows:

> "1. Everyone has the right to freedom of expression. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ...”

A. The parties’ submissions

34. The Government submitted that the views expressed by the applicant – that is to say denial of the Holocaust – ran counter to the text and spirit of the Convention and that he therefore could not, under Article 17 of the Convention, rely on Article 10 as regards his impugned statements. This part of the application was thus incompatible *ratione materiae* with the provisions of the Convention. In the alternative, they maintained that the complaint was ill-founded. The applicant’s criminal conviction for the impugned statements constituted a justified interference under Article 10 § 2 of the Convention. The domestic courts had comprehensively assessed the case in fact and in law and had thoroughly reasoned their decisions, notably as to why the statements had amounted to Holocaust denial. The fact that the applicant had been a Member of Parliament at the material time and that the statement had been made in Parliament did not lead to a different result.

35. The applicant submitted that the domestic courts had wrongfully interpreted his statements as Holocaust denial. They had wrongfully selected a small part of his speech and had based the applicant’s conviction on these aspects viewed in isolation, rather than assessing the speech as a whole. His speech was not to be understood as such a denial, but as a criticism of the culture of remembrance, as upheld by the German establishment. Its purpose had not been to deny the suffering of Jewish victims but to call for an honouring of the suffering of “German” victims as well. His statements did not fall within the ambit of Article 17 of the Convention. As a Member of the Parliament of the *Land* of Mecklenburg-Western Pomerania, he benefitted from non-liability for statements made in Parliament, and interferences with his right to freedom of expression called for the closest scrutiny.

B. The Court’s assessment

36. The former Commission and the Court have dealt with a number of cases under Articles 10 and/or 17 of the Convention concerning denial of the Holocaust and other statements relating to Nazi crimes and declared them inadmissible, either as being manifestly ill-founded (see recently *Williamson v. Germany* (dec.), no. 64496/17, 8 January 2019) – relying on Article 17 as an aid in the interpretation of Article 10 § 2 of the Convention and using it to reinforce its conclusion on the necessity of the interference – or as being incompatible *ratione materiae* with the provisions of the

Convention in view of Article 17 of the Convention (see *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 209-212, ECHR 2015 (extracts), with further references; see also *Roj TV A/S v. Denmark* (dec.), no. 24683/14, §§ 26-38, 17 April 2018, for an analysis of the case-law concerning Article 17 of the Convention).

37. The Court reiterates that Article 17 is only applicable on an exceptional basis and in extreme cases and should, in cases concerning Article 10 of the Convention, only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention (see *Perinçek*, cited above, § 114). The decisive point when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17, is whether those statements are directed against the Convention's underlying values, for example by stirring up hatred or violence, or whether by making the statement, the author attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it (see ibid., § 115; and *Roj TV A/S*, cited above, § 31). In a case concerning Holocaust denial, whether the Court applies Article 17 directly, declaring a complaint incompatible *ratione materiae*, or instead finds Article 10 applicable, invoking Article 17 at a later stage when it examines the necessity of the alleged interference, is a decision taken on a case-by-case basis and will depend on all the circumstances of each individual case.

38. In its case-law, the Court has consistently underlined the particular importance of freedom of expression for Members of Parliament, this being political speech *par excellence*. States have very limited latitude in regulating the content of Parliamentary speech. However, some regulation may be considered necessary in order to prevent forms of expression such as direct or indirect calls for violence. Through the generally recognised rule of Parliamentary immunity (as a generic concept covering both aspects non-liability and inviolability) the States provide an increased level of protection to speech in Parliament, with the consequence that the need for the Court's intervention could nonetheless be expected to be rare. Interferences with the freedom of expression of an opposition Member of Parliament call for the closest scrutiny on the part of the Court (see the summary of relevant principles in *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, §§ 137-141, 17 May 2016, with further references).

39. In the present case the Court considers, on the one hand, that the applicant's statements showed his disdain towards the victims of the Holocaust, which speaks in favour of the incompatibility *ratione materiae* of the complaint with the provisions of the Convention (compare *Witzsch v. Germany (no. 2)* (dec.), no. 7485/03, 13 December 2005). On the other hand, it has regard to the fact that the statement was made by a Member of

Parliament during a Parliamentary session, such that it could warrant an elevated level of protection and any interference with it would warrant the closest scrutiny on the part of the Court. Having regard to the role of Parliamentary immunity in providing increased protection to speech in Parliament, the Court considers it to be of particular relevance that the Parliament of the *Land* of Mecklenburg-Western Pomerania revoked the applicant's inviolability from prosecution (see paragraphs 6, 15 and 29 above).

40. To the extent that the applicant can rely on Article 10 of the Convention, the Court finds that his criminal conviction for the statement at issue amounted to an interference with his right to freedom of expression. Such interference will infringe the Convention if it does not meet the requirements of Article 10 § 2 of the Convention.

41. The Court reiterates that it is not called upon to examine the constituent elements of the offences of intentional defamation and of violating the memory of the dead; nor is it called upon to examine the extent of the indemnity enjoyed by a Member of Parliament. Rather, it is in the first place for the national authorities, especially the courts, to interpret and apply domestic law (see *M'Bala M'Bala v. France* (dec.), no. 25239/13, § 30, ECHR 2015 (extracts), with further references). Accordingly, the Court is satisfied that the interference was prescribed by law (namely Articles 187 and 189 of the Criminal Code) and that it pursued the legitimate aim of protecting the reputation and rights of others.

42. The Court thus has to determine whether the interference with the applicant's right to freedom of expression was "necessary in a democratic society". The relevant principles are well established in the Court's case-law and have recently been summarised in *Karácsony and Others* (cited above, §§ 132, 137-141).

43. Reiterating that the Court must satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts (see *M'Bala M'Bala*, cited above, § 30), it observes that the Regional Court cited the applicant's speech in its entirety and considered that large parts of it did not raise an issue under criminal law. That court found, however, that these parts of the applicant's speech could not mitigate, conceal or whitewash the qualified Holocaust denial that the applicant had uttered in a small part of the speech. It considered that the applicant had inserted that denial into the speech like "poison into a glass of water, hoping that it would not be detected immediately". He had questioned the true nature of Auschwitz and had "sneaked" this into Parliament in such a way that no parliamentary measures would be taken. The Regional Court was convinced that he had intended to convey his message exactly in the way it was perceived. It assessed the applicant's utterance linguistically and put it into context. It concluded that it could, objectively, only be understood as a denial of the systematic, racially motivated, mass extermination of the Jews

carried out at Auschwitz during the Third Reich (or at least the extent thereof), as reported by historians, and that the applicant's motive was to allege the suppression and exploitation of Germany for the benefit of the Jews.

44. That finding by the domestic courts was based on an assessment of the facts with which the Court can agree. It cannot accept, in particular, the applicant's argument that the domestic courts wrongfully selected a small part of his speech, viewed it in isolation and based his conviction on that small part. The contrary is true. The Regional Court cited and assessed the applicant's speech in full. It clarified that large parts of his speech, in which he had referred to "German" victims in the Second World War, did not raise an issue under criminal law, and that he could rely on his right to freedom of expression in so far as he had criticised the remembrance of the victims of National Socialism and used very strong language to that end (see paragraph 12 above). The Court notes that the applicant's statements concerning the remembrance of the victims of National Socialism were linked to an ongoing debate within Parliament, whereas the statements containing a qualified Holocaust denial, which led to the applicant's criminal conviction, were not. The latter aspect constitutes an important difference to the case of *Kurłowicz v. Poland* (no. 41029/06, 22 June 2010), where the impugned offensive statements had been an integral part of a political debate.

45. The Regional Court found that the applicant had chosen the subject of *Wilhelm Gustloff* by way of a contrast to the previous day's memorial event for victims of the Holocaust (which the applicant and members of his Parliamentary group did not attend). The Court considers that the gist of the Regional Court's reasoning (see paragraph 43 above) was threefold: the applicant inserted the qualified Holocaust denial into his speech, large parts of which did not raise an issue under criminal law, as if inserting "poison into a glass of water, hoping that it would not be detected immediately"; the parts of his speech that did not raise an issue under criminal law could not mitigate, conceal or whitewash the qualified Holocaust denial; and he wanted to convey his message exactly in the way that it was understood by the Regional Court, in the view of an objective observer.

46. The Court attaches fundamental importance to the fact that the applicant planned his speech in advance, deliberately choosing his words (compare and contrast *Otegi Mondragon v. Spain* (no. 2034/07, § 54, ECHR 2011) and resorting to obfuscation to get his message across: a qualified Holocaust denial showing disdain towards the victims of the Holocaust and running counter to established historical facts, alleging that the representatives of the "so-called" democratic parties were using the Holocaust to suppress and exploit Germany. It is with reference to this aspect of the applicant's case that Article 17 of the Convention has an important role to play, regardless of Article 10 being deemed applicable (see

paragraphs 36-37 above). The Court considers that the applicant sought to use his right to freedom of expression with the aim of promoting ideas contrary to the text and spirit of the Convention. This weighs heavily in the assessment of the necessity of the interference (see *Perinçek*, cited above, §§ 209-212).

47. While interferences with the right to freedom of expression call for the closest scrutiny when they concern statements made by elected representatives in Parliament, utterances in such scenarios deserve little, if any, protection if their content is at odds with the democratic values of the Convention system. The exercise of freedom of expression, even in Parliament, carries with it "duties and responsibilities" referred to in Article 10 § 2 of the Convention (see *Karácsony and Others*, cited above, § 139). Parliamentary immunity offers, in this context, enhanced, but not unlimited, protection to speech in Parliament (ibid.).

48. In the present case, the applicant intentionally stated untruths in order to defame the Jews and the persecution that they had suffered during the Second World War. Reiterating that it has always been sensitive to the historical context of the High Contracting Party concerned when reviewing whether there exists a pressing social need for interference with rights under the Convention and that, in the light of their historical role and experience, States that have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis (see *Perinçek*, cited above, §§ 242-243, with further references; see also *Nix v. Germany* (dec.), no. 35285/16, 13 March 2018), the Court therefore considers that the applicant's impugned statements affected the dignity of the Jews to the point that they justified a criminal-law response. Even though the applicant's sentence of eight months' imprisonment, suspended on probation, was not insignificant, the Court considers that the domestic authorities adduced relevant and sufficient reasons and did not overstep their margin of appreciation. The interference was therefore proportionate to the legitimate aim pursued and was thus "necessary in a democratic society".

49. In these circumstances the Court finds that there is no appearance of a violation of Article 10 of the Convention. Accordingly the complaint must be rejected as being manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

50. The applicant complained of a violation of his right to an impartial tribunal, as guaranteed by Article 6 § 1 of the Convention, alleging that the Court of Appeal had lacked impartiality in the light of the involvement of judge X. Article 6 § 1 of the Convention, insofar as relevant, reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

51. The Government contested that argument.

A. Admissibility

52. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

53. The applicant alleged a breach of Article 6 § 1 of the Convention because X had been part of the Court of Appeal formation that had dismissed the applicant's appeal on points of law, despite the applicant's challenge against him on the basis of X's marriage to District Court judge Y. If the Court of Appeal had allowed the applicant's appeal on points of law, this would have entailed, at least indirectly, criticism of the judgment delivered by the District Court. Given their marriage, X may have been hesitant to so criticise his wife, who had convicted the applicant at first instance. This bias was reinforced by the fact that the married couple had discussed the proceedings against the applicant. Moreover, it had been unlawful for X to participate in the decision on the complaint of bias against him. This defect in the decision of 16 August 2013 was not remedied by the subsequent review decision of 11 November 2013.

54. The Government maintained that there were no indications that Court of Appeal judge X had been biased, nor had there been any appearance to that effect. The judgment of the District Court, rendered by X's wife and two lay judges, had not been reviewed by the Court of Appeal, which had only examined the Regional Court's appellate judgment in connection with the applicant's appeal on points of law. There were no indications that X, when exercising his judicial function, had adopted his wife's legal views without making an assessment himself. It was in accordance with domestic law that X had participated in reaching a decision on the complaint of bias against him. The Government added that the Court's recent case-law did not require the impugned judgment to be quashed in order for an impartiality defect to be remedied.

2. The Court's assessment

(a) General principles

55. The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (*Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII K). To that end Article 6 requires a tribunal to be impartial (ibid.). Impartiality normally denotes the absence of prejudice or bias, and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test whereby regard must be had to the personal conviction and behaviour of a particular judge, that is whether the judge in question held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. In the vast majority of cases raising impartiality issues the Court has focused on the objective test, which requires a determination of whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings. It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal. In this connection, even appearances may have a certain importance, or, in other words, "justice must not only be done, it must also be seen to be done" (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, §§ 145-149, 6 November 2018, with further references).

56. As regards "other links" between a judge and other protagonists in a set of proceedings, the Court has previously found objectively justified doubts as to the impartiality of a trial court's presiding judge whose husband was the head of the team of investigators dealing with the applicants' case (see *Dorozhko and Pozharskiy v. Estonia*, nos. 14659/04 and 16855/04, §§ 56-58, 24 April 2008).

57. The national procedures for ensuring impartiality are a relevant factor which the Court takes into account when making its assessment as to whether a tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (see *Micallef v. Malta* [GC], no. 17056/06, § 99, ECHR 2009). The Court previously found that an applicant's doubts in respect of the impartiality of judges dealing with his case were objectively justified in view of the procedure they chose to reject his complaint of bias against them, despite considering that the grounds advanced by the applicant for the alleged bias were not sufficient to raise

legitimate and objectively justified doubts as to the judges' impartiality (see *A.K. v. Liechtenstein*, no. 38191/12, §§ 74 et seq., 9 July 2015). However, in that case, which concerned motions for bias against five constitutional court judges, the constitutional court had decided on each motion in a formation composed of the four remaining judges, each of whom had equally been challenged (ibid., § 77) and in circumstances where, therefore, they all had decided upon motions brought against all of them on identical grounds (ibid., § 79).

(b) Application of these principles to the present case

58. The present case differs from *Dorozhko and Pozharskiy* (cited above) in so far as the marriage in question did not exist between a judge and a (member of a) party to the proceedings, but between two judges dealing with the same case at different levels of jurisdiction.

59. In this respect, the Court notes that the case-law of the domestic courts suggests that a marriage between judges at different levels of jurisdiction that immediately follow one another – that is to say where one spouse, as the judge at a higher level of jurisdiction, is called upon to assess the judgment or decision of the other spouse, who had acted as a judge at a lower level of jurisdiction – may raise objectively justified doubts as to the impartiality of the deciding judge (see paragraph 30 above).

60. In the present case, however, the Court of Appeal acted at third instance in the criminal proceedings against the applicant, whereas the District Court acted at first instance. In accordance with domestic law, the Regional Court, which dealt with the applicant's appeal on fact and law, conducted a main appellate hearing, during which it took evidence and comprehensively established the facts of the case anew (see paragraphs 8 and 19 above). In respect of the applicant's appeal on points of law, the Court of Appeal was only called upon to examine the Regional Court's judgment.

61. Judge X was thus not called to assess the first-instance judgment, in which his wife had been involved. As the Regional Court established the circumstances of the case anew, both in fact and in law, the Court of Appeal's review was limited to the Regional Court's judgment, although in substance it took position on the same issues as the District Court. The Court sees no reason to doubt X's statement that his wife had informed him about the course of the proceedings before the District Court, but that the proceedings had – in line with their general practice – not formed part of their conversations apart from that (see paragraph 18 above). Nonetheless, the fact that X and Y were married and dealt with the applicant's case at different levels of jurisdiction may give rise to doubts as to X's impartiality.

62. As regards the procedure for ensuring impartiality, the Court of Appeal decided, by the same order, on the applicant's complaint of bias and on his appeal on points of law, and X took part in deciding both. Under

domestic law, it would not only have been possible (see *A.K. v. Liechtenstein*, cited above, § 83) to decide on the complaint of bias against X without his participation, but it would even have constituted the default approach stipulated by the legislature (see paragraph 31 above). The objective pursued by the (exceptional) procedure under Article 26a of the Code of Criminal Procedure is to avoid courts having to interrupt or even stay proceedings in order for abusive or irrelevant challenges to be examined (see paragraph 31 above) – which is legitimate in the interest of proper administration of justice (see *A.K. v. Liechtenstein*, cited above, § 68) and in respect of which parallels can be drawn to the participation of judges in proceedings in respect of contempt of court committed before them, which may be compatible with the Convention in exceptional circumstances (compare *Kyprianou*, cited above, §§ 124-25; see also *Słomka v. Poland*, no. 68924/12, 6 December 2018).

63. While it is not for the Court to interpret domestic law, it is difficult to understand how the applicant's bias complaint against X could be deemed "completely ill-suited". As indicated above, X's wife had informed him about the course of the proceedings before the District Court. The Court finds that the applicant's complaint of bias against X could not be considered as abusive or irrelevant as there might have been an appearance of lack of impartiality (see *A.K. v. Liechtenstein*, cited above, § 80; contrast *Debled v. Belgium*, 22 September 1994, § 37, Series A no. 292-B). X's participation in the decision of 16 August 2013 on the bias complaint against him did not help dissipate what doubts there may have been.

64. However, the Court of Appeal subsequently sat as a bench of three judges – of whom none had been involved in the decision of 16 August 2013 or any other previous decision in this case – and dismissed a bias complaint against judge X and the other two judges involved. That complaint had again been founded on the same ground, namely the marriage between X and Y, although this time it was not only directed against X, but also against the other two judges because of their involvement in rejecting his first bias complaint. This – second – decision was taken after an examination of the applicant's complaint on the merits (see paragraphs 23-25 above).

65. The Court has previously found that a lack of impartiality in criminal proceedings had not been remedied in cases where a higher court had not quashed the lower court's judgment adopted by a judge or tribunal lacking impartiality (see *Kyprianou*, cited above, § 134, with further references). Unlike in the present case, where the objective justification of the applicant's doubt in respect of the judges dealing with his appeal on points of law primarily results from the procedure they chose to reject the bias complaint against them, the impartiality defects in earlier cases were either more severe (objective and subjective bias found in *Kyprianou*, cited above, §§ 128 and 133; fundamental flaws in the court-martial system in *Findlay*

v. the United Kingdom, 25 February 1997, §§ 78-79, *Reports of Judgments and Decisions* 1997-I; the composition of the first-instance court and matters of internal organisation in *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86) or the subsequent decisions did not give substantive arguments in response to the applicant's complaint of bias, thus not remedying the defect (*Boyan Gospodinov v. Bulgaria*, no. 28417/07, §§ 58-59, 5 April 2018).

66. The Court also has regard to its judgment in *Vera Fernández-Huidobro v. Spain* (no. 74181/01, §§ 131-136, 6 January 2010), where it found that the defects of the initial investigation against the applicant due to the lack of impartiality of the first investigating judge had been remedied by the fresh investigation conducted by an investigating judge from a higher court (the Supreme Court), despite the applicant's conviction by the Supreme Court, the single level of jurisdiction at the which the applicant had been tried. In *Crompton v. the United Kingdom* (no. 42509/05, §§ 76-79, 27 October 2009), which concerned the civil limb of Article 6 of the Convention, the Court found that the higher instance had "sufficiency of review" to ensure that the requirements of Article 6 of the Convention regarding the independence and impartiality of the tribunal were met, and notably to remedy any lack of independence of the lower instance, even though it could not make a substantive ruling as to an appropriate award in the circumstances of the case. The Court deemed it sufficient that the higher instance could and did examine both the method of calculation and the base figures used for the calculation and, in the applicant's case, had found the base figure to be inaccurate and required the lower instance to review the calculation.

67. In the present case, the subsequent review decision of 11 November 2013 was not rendered by a higher court, but rather by a bench of three judges of the same court who had not been involved in any previous decisions in the applicant's case. The review decision did not entail a full assessment of either the applicant's appeal on points of law or the decision of 16 August 2013 dismissing it as ill-founded, but was limited to the question of whether the judges involved in the decision of 16 August 2013 had been biased. However, if the review decision had been rendered in the applicant's favour, the applicant's motion to be heard would subsequently have had to be adjudicated by other judges (see paragraph 32 above). It was thus submitted to a subsequent control of a judicial body with sufficient jurisdiction and offering the guarantees of Article 6 of the Convention (*Vera Fernández-Huidobro*, cited above, § 131). The present case differs from *A.K. v. Liechtenstein* (cited above), where the defect at issue similarly related to the choice of procedure for adjudicating the bias complaint, since there had not been any subsequent review of the bias complaint in that case and the judges had been deciding on bias complaints brought against all of them on identical grounds (see paragraph 57 above).

68. Lastly, the applicant had not given any concrete arguments why a professional judge – being married to another professional judge – should be biased when deciding on the same case at a different level of jurisdiction which did not, moreover, entail review of the spouse's decision, and the Court of Appeal gave sufficient arguments in its decision of 11 November 2013 in response to the applicant's submissions (*a contrario Boyan Gospodinov*, cited above, §§ 58-59).

69. In these circumstances the Court finds that the participation of the judge X in the decision on the bias complaint against him was remedied by the subsequent assessment, on the merits, of the bias complaint, for which the applicant had advanced the same ground, by a separate panel of judges of the same court on 11 November 2013.

70. The Court thus concludes that there have not been objectively justified doubts as to the Court of Appeal's impartiality. Accordingly, there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint concerning Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, by four votes to three, that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 3 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Yonko Grozev
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Grozev and Mits is annexed to this judgment.

Y.G.
M.B.

JOINT PARTLY DISSENTING OPINION OF JUDGES GROZEV AND MITS

We fully agree that the applicant's statements, even if made in Parliament, affected the dignity of the Jewish people to the point that, taking into account the particularities of the German context, a criminal law response was justified in this case. The complaint under Article 10 therefore has to be rejected as manifestly ill-founded. As a matter of principle, however, we cannot agree with the majority that there were no objectively justified doubts about the impartiality of the Court of Appeal. We find that there has been a violation of Article 6 § 1 in this case.

General principles relating to objective impartiality

It is objective impartiality which is a stake in this case. As summarised in paragraph 55 of the judgment, the essence of the objective test is to ascertain whether the tribunal, including its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. The major focus of the objective test is the existence of hierarchical or other links between the judge and other protagonists in the proceedings. It seeks to establish, in each individual case, whether the impugned relationship is of such a nature and degree as to indicate a lack of impartiality on the part of the competent judge or court. The Court has constantly reiterated that even appearances may have a certain importance, or, in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public; therefore, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, §§ 145-149, 6 November 2018, with further references).

In deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef v. Malta* [GC], no. 17056/06, § 96, ECHR 2009). The point of reference in the application of the objective test is whether the conduct of a judge may prompt objectively held misgivings as to impartiality from the point of view of an external observer (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII).

Finally, the national procedures for ensuring impartiality are a relevant factor which the Court takes into account when making its assessment as to

whether a tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (see *Micallef*, cited above, § 99).

Application of the principles in the circumstances of the case

We agree with the majority that the fact that X and Y were married and dealt with the applicant's case at different levels of jurisdiction may of itself give rise to legitimate doubts as to X's impartiality. For us, this is a particularly important point, as we believe that close family links carry in the eyes of an external observer a heavy weight, and thus provoke reasonable fears of a lack of impartiality. We would like to point out that the approach in the case of *Dorozhko and Pozharskiy v. Estonia* (nos. 14659/04 and 16855/04, 24 April 2008) is conceptually of relevance also to the present case (see, by contrast, paragraph 58 of the present judgment). It is true that in *Dorozhko and Pozharskiy* the objectively justified doubts arose from the fact that a trial judge was married to a party to the case – the head of the prosecution team. The underlying concern, however, is the same. Namely, a fear of a lack of impartiality arising from the intimately close relationship between spouses who take substantive decisions in the same case. It is of no relevance, for us, whether the spouses find themselves as different parties to the same case or as judges at different levels of the judicial review. What is at stake here is the confidence which the courts in a democratic society must inspire in the general public.

Once the existence of a legitimate reason to fear the bias of judge X has been established, the national procedures for review of impartiality have to be looked at. The Schwerin District Court, sitting as a bench with the professional judge Y and two lay judges, convicted the applicant of violating the memory of the dead and of defamation and sentenced him to a suspended term of eight months' imprisonment with probation. The Schwerin Regional Court, sitting as a bench of three judges, reviewed the case as to the facts and the law and upheld the applicant's conviction and sentence for the same offences. While his appeal was pending before the Rostock Court of Appeal, the applicant submitted his complaint of bias against judge X, the husband of judge Y who had convicted him in the first instance. The Rostock Court of Appeal, sitting as a bench with judge X as Judge Rapporteur and two other judges, dismissed the applicant's complaint of bias against judge X as having no merit and simultaneously dismissed the applicant's appeal on points of law as ill-founded.

With respect to the complaint of bias, judge X had explained that his wife, judge Y, had informed him about the course of the proceedings but the proceedings themselves had not been discussed. The Rostock Court of Appeal, sitting as a bench with judge X, reasoned that it was reviewing the

judgment of the Schwerin Regional Court and not that of the Schwerin District Court and the fact that X and Y were married in and of itself could not lead to a fear of bias. It is our view that, at this stage, it was not merely that the domestic proceedings "did not help dissipate what doubts there may have been" (see paragraph 63 of the judgment). By its outright denial of any legitimacy of the fear of bias because of the close family links between judges Y and X, and by allowing judge X to decide on the complaint of bias against himself, the Rostock Court of Appeal in fact reinforced the fear of bias rather than remedying it.

While being critical of this decision of the Rostock Court of Appeal, the majority found that the subsequent review of the applicant's bias complaint against the bench of the three Rostock Court of Appeal judges in the circumstances of the case provided a sufficient remedy. It is at this point of its analysis that we part ways with the majority. As the judgment rightly points out in paragraph 65, a lack of impartiality can be remedied by a fresh examination of the case by a higher court whose impartiality cannot be called into question. This, however, did not happen in the present case, as the subsequent review by a different panel of the Rostock Court of Appeal did not carry out a fresh examination of the case against the applicant, but merely reviewed the bias complaint against the three judges of the same court.

Indeed, once the applicant's appeal on points of law and complaint of bias against judge X had been dismissed by a bench of the Rostock Court of Appeal including judge X, the applicant submitted a motion to be heard alleging that some of his arguments, *inter alia*, those relating to the bias complaint against judge X, had not been addressed. He also submitted a bias complaint against all three judges of the Rostock Court of Appeal. The same Rostock Court of Appeal sitting as a bench with three different judges took up the bias complaint against their three colleagues and dismissed it as ill-founded. They mainly reasoned that the grounds justifying the objection were not present and that the prior involvement of a judge with the case in itself did not justify objecting to a judge's participation (see paragraphs 24-25 of the judgment).

As a result of the domestic proceedings, the applicant was convicted for the same crimes and given the same sentence as that initially imposed by the Schwerin District Court with judge Y sitting on the bench. The appeal on points of law, together with the bias complaint against judge X, including the argument about his indirect involvement with his wife's decision, was reviewed on the merits only by the Rostock Court of Appeal with the participation of judge X himself. The judgment of the Rostock Court of Appeal, giving rise as it did to a legitimate fear of a lack of impartiality, was

not quashed, and the applicant's arguments of bias stemming from the marital relationship between judges X and Y were not addressed, on the merits, with the requisite attention and reasoning.

At this point we would like to recall the Commentary on the Bangalore Principles of Judicial Conduct adopted by the Judicial Group on Strengthening Judicial Integrity in 2007, which describe in detail how to apprehend bias when assessing objective impartiality:

> "81. ...The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information. The test is 'what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly'... The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasize that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by other judges of the capacity or performance of a colleague."

It should not be forgotten that the test of objective impartiality is not based solely on the assessment by judges of the capacity of their learned colleague to perform his or her tasks impartially. It is based on the need for public confidence in the judiciary and therefore the issue must be approached from the perspective of an external observer. These crucial elements are sometimes lost amidst legal analysis of the twists and turns of the procedures applied.

Conclusion

We find that the fear about a lack of impartiality of the Rostock Court of Appeal was objectively justified and that the procedures followed in this case did not remedy this objectively held fear. Consequently, there has been a violation of Article 6 § 1 of the Convention.